No. 11924

United States Circuit Court of Appeals

For the Ninth Circuit

A. G. ROLE,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and THE UNITED STATES OF AMERICA,

Appellees.

Brief of Appellant, A. G. Role

Upon Appeal from the District Court of the United States for the District of Montana

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STATEMENT OF JURISDICTION

Plaintiff brought this action on behalf of himself and others similarly situated against their common employer to recover overtime pay under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-216, a law of the United States regulating interstate commerce and jurisdiction of this action rests in the Federal Courts under the authority of 52 Stat. 1069, 29 U. S. C. A., Sec. 216 (b). The complaint seeks overtime pay under the Fair Labor Standards Act (R. 2, 3, 4, 5, 6, 7, 8). The defendant interposed a suggestion of lack of jurisdiction and Motion for Judgment on the pleadings. Upon this Motion (R. 20-21) final judgment was rendered (R. 26,

27, 28, 29, 30) and an Order was entered dismissing the action with prejudice (R. 31-32). This is a final decision and appeal is allowed under Sec. 225 of Title, 28 U. S. C. A. being Judicial Code, Sec. 128, as amended.

STATEMENT OF CASE

This action was commenced April 10, 1947, to recover overtime pay under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219. The fact situation as set out by the allegations of the complaint (R. 2-13) is as follows: The defendant is a corporation engaged in logging operations in Montana and in producing lumber products for sale and shipment in interstate commerce. The plaintiff is an employee of the defendant and brings the suit on his own behalf and on behalf of other employees similarly situated. The plaintiff and the other employees similarly situated will hereafter be referred to as the "employees." The employees are engaged in the production of goods for interstate commerce. They allege in their complaint that they were required to work more than forty (40) hours in each work week and that they were not compensated, as required by the Fair Labor Standards Act, for the additional time so worked. That time was time spent in traveling from the headquarters of the defendant corporation at Libby, Montana, to its woods operations in the vicinity of Troy, Montana, and in the vicinity of Warland, Montana. It is alleged that the travel was in conveyances owned and operated by the defendant corporation and over roads built and maintained by the defendant corporation. Additionally, it is alleged that plaintiff and those similarly

situated were not compensated for time spent in handling, carrying, caring for or putting away tools and receiving orders for the conduct of the defendant's business. The complaint alleges that the time in traveling, etc., occurred before and after the regularly scheduled starting and quitting times and that the work set out required the expenditure of mental and physical energy and labor which was essential, necessary for, and required by the character and nature of the work and were pursued necessarily and primarily for the use and benefit of the defendant. No exact sum is sued for, the plaintiff alleging that he has not available the records containing full information as to the exact time worked and that information is in the possession of the defendant. Interrogatories are attached to the complaint designed to bring out that information (R. 8-9).

Defendant filed its Answer on June 9, 1947 (R. 14-19). Thereafter on June 10, 1947, Suggestion of Lack of Jurisdiction and Motion for Judgment on the pleadings was filed by defendant (R. 20-21). This Motion was based upon the enactment of the Portal to Portal Act of 1947 (29 U. S. C. A., 251 et seq.; Pub. Law 49, 80th Congress). The provisions of this Act will be referred to in the Argument. Briefly stated, its provisions seek to do two things, (1) withdraw jurisdiction from all Courts of any action to enforce certain liabilities under the Fair Labor Standards Act and (2) deny recovery to employees who are seeking compensation for or on account of activities, which were not compensable either by an express provision of a written or non-written contract of employ-

ment between defendant and such employees, or by any custom or practice covering such activities in effect between defendant and such employees. After intervention by the United States (R. 23) and after arguments and the submission of Briefs the Court made its decision and entered its Order dismissing the action and entering Judgment for the defendant (R. 31-32). Plaintiff appealed (R. 32).

This appeal raises the questions: (1) Are the rights of employees for overtime compensation under the Fair Labor Standards Act vested rights? (2) May those rights be destroyed by a subsequent act of Congress? (3) Are those portions of the Portal to Portal Act, Sec. 2, Part II, Public Law 49, 80th Congress, purporting to bar actions like this, constitutional?

SPECIFICATIONS OF ERROR

1. The Court erred in finding that the defendant is not subject to liability and to pay overtime compensation to the plaintiff and to other workmen similarly situated designated in Schedule "A" attached to the complaint for the activities involved because of the provisions of Subsection (a) and (b), Part II, Section 2 of the Portal to Portal Act of 1947.

2. The Court erred in holding that the activities upon which these claims in this action are based are not such activities as are compensable under Subsection (a) and (b), Part II, Section 2 of the "Portal to Portal Act of 1947", Public Law 49, 80th Congress, and, therefore, the Court pursuant to Subsection (d) of said Section 2, has

no jurisdiction to enforce any liability or impose any punishment therefor.

3. The Court erred in holding that the Court is without jurisdiction to grant the relief prayed for in the complaint.

4. The Court erred in sustaining defendant's motion for judgment on the pleadings.

5. The Court erred in dismissing the action.

ARGUMENT

The Specifications of Error together present to the Court the question of the constitutionality of Section 2, Part II, of the Portal to Portal Act of 1947, Public Law 49, 80th Congress, 29 U. S. C. A., 251 et seq. As the matter was presented to the District Court the plaintiff admitted that the time spent in traveling in conveyances furnished by the defendant, in part over roads built and maintained by the defendant, had not been compensable historically either by written or non-written contract or by custom as set out in the Portal to Portal Act of 1947. If Section 2 of that Act, which purports to bar existing claims is constitutional, then the decision of the District Court must be affirmed. It is the position of the plaintiff that the claims here involved are vested rights which may not be taken from the employees by subsequent legislation and that the Portal to Portal Act is unconstitutional insofar as it seeks to destroy the existing causes of action by Section 2 (a) which denies recovery where the time was not compensable by contract or custom and by Section 2 (d) which re-

moves jurisdiction of all Courts to hear and adjudicate actions for such compensation. Section 2 of the Portal to Portal Act, Public Law 49, 80th Congress, 29 U. S. C. A., 251 et seq., provides:

"PARTS II—EXISTING CLAIMS
RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.

Sec. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under Subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the

> Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b)."

Under the authority of three decisions of the United States Supreme Court the activities upon which this suit is based are labor within the provisions of the Fair Labor Standards Act of 1938, Anderson v. Mt. Clements Pottery Co., 328 U. S. 680; Tennessee Coal, Iron & R. R. v. Muscoda, 321 U. S. 590; Jewell Ridge Coal Corp. v. U. M. W., 325 U. S. 161.

In a decision from the District Court of Montana, Judge Brown presiding, rendered August 24, 1946, it was held that travel time in conveyances furnished by the employer, under facts almost identical to those alleged in the complaint in this case, was labor under the Fair Labor Standards Act. Walling v. Anaconda Copper Mining Company, 66 Fed. Sup. 913.

From these decisions it is clear that absent the Portal to Portal Act of 1947, Public Law 49, 80th Congress, this complaint states a cause of action and its dismissal would have been error. This brief then will be devoted to a consideration of whether these claims are vested rights and whether by retroactive legislation these rights, if they are vested, may be destroyed.

A CAUSE OF ACTION FOR OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT IS A VESTED RIGHT.

There can be no question but that purely statutory privileges, penalties and forfeitures may be destroyed by subsequent retroactive legislation.

Examples of cases falling within this statement include Pearsall v. Great Northern R. R. Co., 161 U. S. 646, 40 L. ed. 838, where the statute giving a right to the railroad company to consolidate with other lines was repealed prior to the attempted consolidation. The right was executory and the Court held the destruction of the right to be valid. In Western Union Telegraph Co. v. Louisville & Nashville R. R. Co., 258 U. S. 13, 66 L. ed. 437, it was held that an inchoate right to maintain an action or secure a benefit for which no consideration had been given could be avoided by legislation enacted while the suit was pending.

Norris v. Crocker, 13 How. 429, held there was no vested right to the collection of a statutory penalty. To the same effect see Maryland v. Baltimore & Ohio R. R. Co., 3 How. Pr. 534, 11 L. ed. 714.

The Court in Re Hall, 167 U. S. 38, 42 L. ed. 69, held there was no vested right in a governmental gratuity. A number of cases have held that informer statutes create no vested rights. Confiscation Cases, 74 U. S. 454.

Modification of a remedy is valid even though operating retroactively so long as the entire remedy is not destroyed. Gibbs v. Zimmerman, 290 U. S. 326, 78 L. ed. 342; Home Building and Loan Assoc. v. Blaisdell, 290 U. S. 398,

78 L. ed. 413; Ex Parte McCardle, 7 Wall. 506, 19 L. ed. 264; Norman v. Baltimore and Ohio R. R. Co., 294 U. S. 240, 79 L. ed. 885.

Statutes have been upheld which have the effect of legalizing previously unlawful transactions. In Ewall v. Daggs, 108 U. S. 143, it was held that a contract originally illegal because usurious could be cured by subsequent legislation. The court sustained a statute in effect validating a contract, which at its inception, was illegal because it was for less than the published rate of the carrier involved in National Carload Corp. v. Phoenix-El Paso Express, 176 S. W. (2) 564. Cert. denied 322 U. S. 747, 88 L. ed. 1578.

The rationale behind all of these decisions is that there was no right which had vested. It is our position that the right to overtime compensation under the fair labor standards is a vested right and the right may not be destroyed or substantially impaired on the authority of the cases set out above.

The nature of the right to recover overtime pay under the Fair Labor Standards Act of 1938 has been explored and defined in several decisions. The decisions uniformly hold that the claim for overtime wages, for liquidated damages and for attorneys' fees is not based upon a statutory penalty or a bare statute given right, but upon contract.

In Walling v. McKay, 70 Fed. Sup. 160, 169, the Court said:

> "Furthermore, the obligation imposed by the Fair Labor Standards Act and the provisions embodied

> therein must be read into and treated as being a part of every contract of employment to which the Act applies."

The Supreme Court of the United States in Overnight Motor Transport Co., Inc., v. Missel, 316 U. S. 572, 583, held:

> "The liquidated damages for failure to pay the minimum wages under Sections 6(a) and 7(a) are compensation, not a penalty or punishment by the government. (Citing cases) The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. (Citing cases.)"

This decision was cited with approval in the recent case of Brooklyn Bank v. O'Neill, 324 U. S. 697, 707.

In the case of Northwestern Yeast Company v. Broutin, 133 Fed. (2d) 628, 630, Circuit Ct. of Appeals of the 6th Circuit, the Court was considering the validity of an attachment in a suit for overtime wages under an Ohio statute which permits attachments in suits for labor performed "under a contract of employment". Defendant's position was that the claim was for penalty. The Court said:

> "* * * we think that this claim clearly arises upon contract. The recovery authorized by Sec. 16 (b) of the Fair Labor Standards Act does not constitute a penalty, but is considered compensation. (citing Overnight Motor Transport Co., and others.) The Federal statute is premised upon the existence of an employment contract. * * * Thus here the claim for overtime compensation is founded upon and is coexistent with the contract. The action for double

> compensation may be considered as debt or an action for wages due under the employment agreement. (Citing cases.)"
>
> "* * * the statutory obligation contained in the Fair Labor Standards Act is read into and becomes a part of every employment contract between an employer and employee subject to the terms of the Act. The liability is for the wages due employees under working agreements which the federal statutes require employer and employee to make."

To the same effect is Hays v. Bank of America, California, 162 P. (2d) 679, where a similar attachment statute was involved. The Court said:

> "Clearly the provision of the Act (Fair Labor Standards Act) for overtime wages is for compensation for services and not penal in nature."

Citing Overnight Motor Transport Co., Inc., v. Missel, supra, and Brooklyn Bank v. O'Neill, supra.

In Gangi v. Schulte, 328 U. S. 108, the Supreme Court in speaking of the recovery allowed under the Act said that "the damages are at the same time compensatory, and an aid to enforcement."

The Court in Republic Pictures v. Kappler, 151 Fed. (2d) 543, held "The action for overtime under the statute is an action on Contract." To the same effect is the holding in Reid v. Solar Corporation, (D. C. Iowa) 69 Fed. Supp. 626.

Since the claims arise under the contract of employment which incorporate within themselves the provisions of the

Act, cases which hold that legislative action can retrospectively cut off purely statutory rights and penalties have no application.

A case similar in many respects to the ones here under consideration is Pacific Mail Steamship Co. v. Jolliffe, 17 L. Ed. 805, 807. By an act of California, ship owners who refused the proferred tender of a pilot's service were required to pay to the pilot half the usual fee. The plaintiff action under the Act. While the action was pending the Act was repealed. In discussing the case, the Court said:

> "His (the attorney general's) position is, that as the claim to half pilotage fees was given by the statute, the right to recover the same fell with repeal of the statute; and that this court must dismiss the writ of error on that ground.
>
> "The claim to half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. The transaction in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract.
>
> "The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the*

> *nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.* And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

THE CLAIM FOR OVERTIME COMPENSATION, NOT BEING A PURELY STATUTORY RIGHT, IS VESTED AND UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION THE CONGRESS MAY NOT TAKE THE RIGHT AWAY BY RETROACTIVE LEGISLATION.

The Fifth Amendment provides in part: "No person * * * shall be * * * deprived of life, liberty or property, without due process of law." It is our contention that in Part II of the Portal to Portal Act of 1948, Public Law 49 of the 80th Congress does seek to take from its citizens their property without due process of law.

Chief Justice Marshall in the leading case of Marbury v. Madison, 1 Cranch 137, said, "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested rights."

In Osborne v. Nicholson, 80 U. S. 654, 662, 20 L. Ed. 689, the Court considered a statute providing that no trans-

action with regard to slavery should be valid. A slave was sold and delivered while the institution of slavery was legal. Suit to recover the purchase price was brought after the enactment of the statute being considered. In holding the subsequent legislation did not defeat the right of recovery the Court said:

> "Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils."

It has been almost uniformly held that a person cannot be divested of previously vested rights. Coombs v. Getz, 285 U. S. 434; Ettor v. Tacoma, 228 U. S. 148, 156; Pritchard v. Norton, 106 U. S. 124; Hawthorne v. Calef, 2 Wall. 10; Steamship Co. v. Jolliffe, 17 L. Ed. 807; Ochiltree v. Railroad, 21 Wall. 249, 252-253; Treigle v. Acme Homestead Association, 297 U. S. 189; Lynch v. United States, 292 U. S. 571, 585; Duke Power Co. v. South Carolina Tax Commission, 81 F. (2d) 513; National Surety Corporation v. Wunderlich, (C. C. A. 8), 111 F. (2d) 622; Badger v. Hoidale, (C. C. A. 8), 88 F. (2d) 208; Harrison v. Remington Paper Co., 140 F. 385, 390; Knickerbocker Trust Co. v. Myers, 133 F. 764, 767.

Ettor Case. The State of Washington by statute required municipalities to compensate property holders for

damages resulting from street grading. While these actions were being heard this statute was repealed. The district court took the position that the right of action was statutory and fell within the statute. The Supreme Court reversed, holding:

> "The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common law action for a breach of the statutory obligation.
>
> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.*" (Emphasis added.)

Hawthorne Case. A state statute provided that shares of stockholders would be liable for the debts of the corporation. A creditor sued a stockholder although the in-

dividual liability provision had been repealed two months after the debt was contracted. The Supreme Court reversed the state court and held that by virtue of the statute the stockholders "agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability"; and that the repealing act impaired the obligation of the contract.

Joliffe Case. California provided by statute that when a pilot went out and offered his services to a vessel and the service was declined, the pilot was entitled to one-half pilotage fees. Pending recovery on a suit for one-half pilotage fees, a new statute was passed repealing the terms of the old. It was claimed that recovery could not be had because the right was statutory and could be taken away. The Supreme Court disagreed with this defense, holding instead:

> "The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.* And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then per-

fect, and the liability of the master or owner of the vessel had become fixed." (Emphasis added.)

Coombs v. Getz. This case involved the contract clause of the Federal Constitution. One section of the California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who contracted with the corporation were suing a director to enforce their rights, the section making the director liable was repealed. The Court in permitting the creditor to recover despite the repealing statute reviews the entire problem of vested versus statutory rights. It said:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. *It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future; but it did not, and could not, destroy or impair the previously vested right of the creditor (which in every sense was a property right. Ettor v. Tacoma, supra; Pritchard v. Norton, supra), to enforce his cause of action upon the contract." Ettor v. Tacoma, supra; Hawthorne v. Calef, supra; Steamship Co. v. Joliffe, supra; Ochiltree v. Railroad Co., supra; Harrison v. Remington Paper Co., supra; Knickerbocker Trust Co. v. Myers, supra.*

In applying the general rule to the facts in this case, the Court in Coombs v. Getz held:

> "Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of suretyship. *Harrison v. Remington Paper Co.*, supra, p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, and cases cited in connection therewith, *supra*) that, *upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, Section 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution.*" (Emphasis added.)

National Surety Corp. v. Wunderlich. A statutory provision permitting creditors (for labor, supplies, etc.) of contractors to sue surety within 60 days of settlement was held on the authority of Coombs v. Goetz to be a part of the contract so that a subsequent statute repealing this provision and substituting a one-year statute of limitations was not given retroactive effect where the 60 day period had elapsed prior to repeal and the suit was brought after repeal but within the new one-year provision. The Court

conceded that the liability was contractual and not statutory.

Badger v. Hoidale. The Eighth Circuit Court of Appeals as in the National Surety Corp. case, following the authority of Coombs v. Goetz, held that stockholder's liability to creditors remained after repeal of the constitutional provision upon which the claim was based. The result was reached on the basis of the Court's opinion that because the liability antedated the repeal and was contractual, it could not be impaired retroactively.

In Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U. S. 338, 66 L. Ed. 647, a suit was brought for repayment of tolls collected for passage through a canal in the face of a statutory prohibition against such collection. On the day of the decision in that suit the legislature passed an act purporting to validate those tolls and to destroy the plaintiff's cause of action. Mr. Justice Holmes, for the Supreme Court, held the legislative enactment was unconstitutional and the boat line could not be deprived of its right to recover the overcharge. In doing so he said:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money which was due when the act was passed.
>
> "Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force should be at plaintiff's disposal is less absolute than it is

> when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation."

The last sentence from the quotation above applies with equal force to the facts in the present case. The Congress in the Portal to Portal Act of 1947, said that claims for overtime pay shall be barred because of their adverse effect upon interstate commerce. If the Congress could do this within the Fifth Amendment why could it not enact a statute which would bar retrospectively recovery for goods sold in interstate commerce? Obviously under the Forbes decision it could not do that. How can it logically be argued that the protection of the Fifth Amendment does not extend as well to claims for the recovery of compensation for work and labor performed? Under the decisions cited heretofore in this brief time spent in travel in company owned conveyances under company control is just as much work and labor as is the time spent by an employee swinging an ax in the woods. If constitutionally the claim for overtime can be barred would it not equally be true that the Congress could by retrospective legislation deny recovery to employees for the time spent in falling trees?

There is no basis for distinguishing what Congress has attempted to do here from the legislative action held unconstitutional in the case we have above considered. It is true that these cases deal with enactments of the various states but there can be no question but that the principles which apply to state actions under the Fourteenth Amendment are applicable also to Federal Acts under the Fifth

Amendment. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 50 L. Ed. 246; Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940; Wright v. Union Central Life Ins. Co., 304 U. S. 502, 82 L. Ed. 1490; Fed. Power Commission v. Natural Gas Co., 315 U. S. 575, 86 L. Ed. 1037.

The Portal to Portal Act was passed under the broad powers of the Congress to regulate interstate commerce. That power, like all other power of the sovereignty, is limited by the Constitution of the United States. Chief Justice Marshall in Gibbons v. Ogden, 22 U. S. 1, 6 L. Ed. 23, had this to say:

> "This power (to regulate commerce) like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and *acknowledges no limitation other than are prescribed in the Constitution.*"

This language is quoted time after time in subsequent decisions.

The limitation on the power of Congress under the Interstate Commerce Clause is more specifically stated in Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, 347, 79 L. Ed. 1468:

> "All agree that the pertinent provision of the Constitution is Article I, Sec. 8, Clause 3, which confers power on the Congress 'To regulate commerce . . . among the several States . . .'; and that *this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.*"

The Supreme Court, many times, has said that all of the great substantive powers granted to Congress in the Constitution are subject to the Fifth Amendment. Monongahela Nav. Co. v. U. S., 148 U. S. 312, 336, 13 S. Ct. 622, 37 L. Ed. 463; U. S. v. Joint Traffic Ass'n., 171 U. S. 505, 571, 19 S. Ct. 25, 43 L. Ed. 259; Lottery Case, 188 U. S. 321, 362; Carroll v. Greenwich Ins. Co. of New York, supra, 199 U. S. 401, 410, 26 S. Ct. 66, 50 L. Ed. 246; U. S. v. Chicago M. St. P. & P. R. Co., 282 U. S. 311, 51 S. Ct. 159, 75 L. Ed. 359; Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 589, 55 S. Ct. 854, 79 L. Ed. 1593; Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va., 300 U. S. 440, 456, 57 S. Ct. 556, 81 L. Ed. 736; North American Co. v. S. E. C., 327 U. S. 686, 705, 66 S. Ct. 785, 90 L. Ed. ....

To summarize this portion of the argument of plaintiff the claim for overtime compensation under the Fair Labor Standards Act is quasi-contractual. It is not for a penalty nor is it purely statutory. At the time of the enactment of the Portal to Portal Act of 1947 the rights of the plainiff and those here represented to the compensation had accrued, a cause of action was in existence. A cause of action which has accrued is a vested right and constitutes property in the same sense in which tangible things are property and is protected by the provisions of the Constitution as much as any other property rights. Ettor v. City of Tacoma, 228 U. S. 148, 57 L. Ed. 773. The facts in this case are strikingly similar to those in Steamship Company v. Joliffe, supra, 69 U. S. 450, 17 L. Ed. 805. The power of Congress over interstate commerce is limited by

the constitutional inhibitions as are all of the great powers given to that body. We sincerely urge that the Portal to Portal Act of 1947 constitutes the taking of property without due process of law under the contemplation of the Fifth Amendment to the Constitution of the United States and for that reason Part II of the Act is unconstitutional.

WE BELIEVE THE PORTAL TO PORTAL ACT OF 1947 IS UNCONSTITUTIONAL FOR THE FURTHER REASON THAT IT REPRESENTS AN INVASION OF THE JUDICIAL PREROGATIVE BY THE LEGISLATURE

By the language contained in Section 1 (a) of Part II of the Portal to Portal Act, it is clear that the Congress is attempting to re-define working time and by so doing to over-rule the decisions of the Courts in Anderson v. Mt. Clements Pottery, supra, and other cases. That it could do this for the future there can be no doubt but when the attempt is to re-define working time for retrospective application then the Congress is invading the province of the judiciary. Article III of the Constitution in Section 1 provides:

> "The *judicial power* of the United States *shall be vested in one Supreme Court*, *and such inferior Courts* as the Congress may from time to time ordain and establish."

Re-defining working time for retrospective application is clearly an exercise of the judicial power. That power may be exercised only by the judiciary. The language of Article III is plain, clear and unmistakable. The Court will not be burdened with many authorities to establish

that what the Congress here tries to do is a judicial act. A reference to Cooley's Constitutional Limitations, 8th Ed., Vol. I, Page 179, et seq., should be sufficient to demonstrate that aside from all other considerations this Act must fall because of the basic principle upon which our government is built, i.e., that one of the co-ordinate branches of government may not infringe upon the prerogatives, powers and duties of another.

To quote a few excerpts from that eminent authority:

> "I entertain no doubt 'says Comstock J.,' that aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial."

The work then goes on to distinguish between legislative and judicial functions at page 183:

> "The legislative power we understand to be the authority under the Constitution to make laws and to alter and repeal them. * * * And it is said that that which distinguishes a judicial from a legislative act is that the one is a *determination of what the existing law is in relation to some existing thing already done or happened,* while the other is a pre-determination of what the law shall be for the regulation of all *future* cases falling under its provisions. (Citing Bates v. Kimball, 2 Chip. 77.)
>
> "And in another case it is said 'the legislative power extends only to the making of laws and in its exercise it is limited and restrained by the permanent authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or trans-

fer to another without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government and is forbidden to the legislative. (Citing Newland v. Marsh, 12 Ill. 383.)"

And further, the author says:

> "* * * to compare the claims of parties with the law of the land before established, * * * is in its nature a judicial act. But * * * to pass new rules for the regulation of new controversies * * * is in its nature a legislative act; * * *."

In Prentiss v. Coast Line Co., 211 U. S. 210, the Supreme Court said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. That is its purpose and end."

The Supreme Court of Iowa in McSurely v. McGraw, 140 Iowa 160, 118 N. W. 415, aptly said:

> "After action is brought it is certainly beyond the power of the legislature to declare the action is void and the Court in which it is pending without jurisdiction. Such matters are purely judicial and not legislative and under our three departments of government it is inadvisable for one to assume the powers, duties, or responsibilities of the other."

Applying these tests to Chapter 49, can there be any doubt but that the Congress is here attempting to exercise a purely judicial function when it seeks by Section 2 of the Act to void existing claims and to interpret the pro-

visions of an existing law as applied to claims in existence at the time the act was passed?

Here the action was pending before the passage of the Portal to Portal Act of 1947. The complaint stated a cause of action under the law as it then stood. The determination of whether the proof would support the complaint was purely a judicial function. Whether the travel time was work and labor was a matter entirely for judicial determination. The cause of action had accrued. Nothing remained to be done to perfect it. The Portal to Portal Act of 1947 attempts to oust the judiciary from an exercise of its inherent powers and the portion of the Act which operates retrospectively, clearly violates the provisions of Article III of the Constitution of the United States.

SECTION 2 (d), PART II OF THE PORTAL TO PORTAL ACT DENIES JURISDICTION TO ANY COURT OF SUITS TO RECOVER OVERTIME UNDER FACTS LIKE THOSE HERE ALLEGED AND IS UNCONSTITUTIONAL IN THAT IT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 2 (d), Part II, of the Portal to Portal Act provides:

> "(d) No court of the United States, of any State, Territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair

> Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

To be doubly sure that it had destroyed the claims of working men for overtime compensation for travel time the Congress included Section 2 (d) in Part II, apparently under the assumption that the Courts might strike down their attempt to destroy the claims by the direct action of Section 2 (a), (b), (c) and (e) but that under their inherent power to regulate jurisdiction they could destroy these rights by the indirect method of denying to the claimants their day in court. The protection of the Fifth Amendment and of the other provisions of the Constitution would be weak, indeed, if substantive rights could be taken from the people by any such device. The purpose of the Congress plainly apparent on the face of the Act was to use withdrawal of jurisdiction as a means of striking down pending actions for overtime pay. It did not take the jurisdiction from some Courts and leave it with others. It did not transfer jurisdiction from a Court to an agency in the nature of a judicial tribune. It did not take the jurisdiction from Federal Courts and give it to State Courts. Under the guise of exercising its authority over the jurisdiction of inferior Federal Courts it seeks to destroy constitutionally-protected private rights by removing every possible means for their judicial enforcement.

In Lynch v. U. S., 292 U. S. 571, 78 L. Ed. 1434, Mr. Justice Brandeis said:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution *whenever the right to enforce them by a legal process is taken away* or materially lessened."

The Supreme Court said in Bronson v. Kinsey, 42 U. S. 311, 11 L. Ed. 143:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract, itself. In either case it is prohibited by the Constitution. * * * And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

In Graham v. Goodcell, 282 U. S. 409, 75 L. Ed. 415, it is said:

> "If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted, substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong."

As we have already said, all the great, substantive powers of Congress are subject to the Fifth Amendment, Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593, and many cases heretofore cited, and certainly this rule applies to the exercise by Congress of its substantive power in the regulation of the jurisdiction of Courts. Other cases dealing with the question are General Investment Co. v. New York Central R. R. Co., 271 U. S. 228, 70 L. Ed. 920; Wheeler v. Jackson, 137 U. S. 245, 35 L. Ed. 659; Gibbes v. Zimmerman, 390 U. S. ...., 78 L. Ed. 342; Home Building & Loan Ass'n. v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413; Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U. S. 124, 81 L. Ed. 552; Godshaux Co. v. Estopinal, 146 La. 405, 83 So. 690; Puterbaugh v. Gila County, 45 Ariz. 57, 46 Pac. (2d) 1064.

It seems clear on general principles and from the above cited cases that this constitutional enactment which attempts to destroy the rights of these employees by the indirect method of denying to any court jurisdiction to hear their claims amounts to the taking of their property without due process of law.

CONCLUSION

We respectfully submit that under the decisions the claim to overtime embodied in this action is based upon a contract of employment. Pacific Mail Steamship Co. v. Jolliffe, 17 L. Ed. 805; Walling v. McKay, ... Fed. Supp. 160; Overnight Motor Transport Co. v. Missel, 316 U. S. 572, and other cases heretofore cited. The cause of action

is a vested right protected by the Fifth Amendment to the Constitution of the United States and comes within the numerous decisions cited in this brief. Ettor v. Tacoma, 228 U. S. 148; Coombs v. Getz, 285 U. S. 434, and many others. The power to regulate interstate commerce, great as it is, is subject to the limitations of the Fifth Amendment. Railroad Retirement Board v. Alton R. R. Co., 295 U. S. 330, and other cases cited. Vested rights may not be destroyed in the exercise of the power to regulate interstate commerce.

We further submit that the Portal to Portal Act of 1947 represents an attempt on the part of the legislative branch of government to exercise the functions of another co-ordinate branch, the judicial. This under the Constitution it cannot do. Cooley's Constitutional Limitations, supra. And finally the attempt to deny jurisdiction of actions like the present one to any court is a taking of property without due or any process of law. Lynch v. U. S., 292 U. S. 571, and other cases heretofore cited.

We submit the judgment of the Lower Court should be reversed with directions to deny the motion to dismiss the action.

Respectfully submitted,

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